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No. 87-1015

In the Supreme Court of the United States

OCTOBER TERM, 1987

CHARLES F. MONAHAN, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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26 pp

QUESTION PRESENTED

Whether the state action doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), protects members and employees of a state self-regulatory board against being compelled to respond to testimonial subpoenas issued in connection with a federal antitrust investigation, on the theory that everything the board does is action of the sovereign state itself and therefore cannot violate the antitrust laws.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 832 F.2d 688. The district court's memorandum and order (Pet. App. A18-A26) is unofficially reported at 1987-1 Trade Cas. (CCH) ¶ 67,540. The letter rulings of a single member of the Federal Trade Commission (Pet. App. A27-A36) and the full Commission (Pet. App. A37-A38) denying petitions to quash investigative subpoenas are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A39) was entered on November 4, 1987. The petition for a writ of certiorari was filed on January 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are the seven members and the present and former executive secretaries of the Massachusetts Board of Registration in Pharmacy (Board). The Board is a self-regulatory agency of the Commonwealth of Massachusetts. Pet. App. A42-A43, A70. By statute, it consists of five retail pharmacists, a hospital pharmacist, and a public member, who are appointed to five-year terms by the Governor (Mass. Gen. Laws ch. 13, § 22 (1984); Pet. App. A114-A115). The Board has statutory authority to license and regulate pharmacists and to promulgate rules and regulations (Mass. Gen. Laws ch. 94C, § 6; *id.* ch. 112, §§ 24, 37, 40, 42A, 61; Pet. App. A118, A128-A129, A136-A140, A142-A144).

Three of the rules promulgated by the Board appear on their face to restrain competition among pharmacists in Massachusetts. One bans advertising claims of "professional superiority" (Mass. Regs. Code tit. 247, § 7.00(7) (1979 & Supp. 1987); Pet. App. A12, A14-A15). Another prohibits pharmacists from engaging in mail-order business (Mass. Regs. Code tit. 247, § 7.00(14); Pet. App. A12, A15). The third forbids the use of so-called "pick-up stations," which are arrangements involving "satellites" or "branch offices" of pharmacies at which prescriptions can be collected, delivered in batch to a pharmacy, and then returned to the branch offices to be picked up by patients (Mass. Regs. Code tit. 247, § 7.00(26); Pet. App. A13-A14, A16).

The Federal Trade Commission (FTC or Commission) is conducting investigations intended to identify possibly unlawful restraints on competition imposed by competitors serving on regulatory boards and to assess potential justifications for such restrictions. On November 4, 1985, the Commission formally authorized the use of com-

pulsory process "to determine whether unnamed state boards that regulate the pharmacy profession" were engaging in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, "by placing unreasonable restrictions on advertising or on business practices that offer increased convenience to consumers" (Pet. App. A63).[1] In May 1986, after the Board refused to allow FTC investigators to interview petitioners, FTC Commissioner Azcuenaga issued testimonial subpoenas to compel petitioners to appear for investigative hearings (Pet. App. A45-A46, A67, A70, A81).

On June 12, 1986, petitioners filed a petition asking the FTC to quash the subpoenas. Their primary assertion was that all actions of state boards are immunized from antitrust scrutiny by the "state action doctrine" of *Parker* v. *Brown*, 317 U.S. 341 (1943). Commissioner Calvani, acting pursuant to delegated authority, denied the petition in a letter ruling. He stated that substantive defenses to antitrust charges are generally premature when raised in response to investigative subpoenas. He also stated that existing precedents do not support the argument that the existence under state statutes of a power to issue regulations automatically confers total immunity from federal antitrust regulation. Pet. App. A27-A36. Petitioners then filed an appeal to the full Commission (C.A. App. 54-67). The Commission denied the appeal, adopted the letter ruling of Commissioner Calvani, and ordered compliance with the testimonial subpoenas (Pet. App. A37-A38).

After being notified that the witnesses would not appear, the FTC petitioned the district court under 15 U.S.C. 49 to order compliance with the subpoenas (Pet.

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[1] Conduct that violates the Sherman Act, 15 U.S.C. 1-7, also constitutes a violation of Section 5. *FTC* v. *Cement Institute*, 333 U.S. 683, 690-692 (1948).

App. A20-A21, A40-A50). The district court ordered compliance (*id.* at A18-A26), finding that the FTC was entitled to enforcement because its assertion of authority to investigate was not "plainly spurious." *Id.* at A23-A24 (citing *FTC* v. *Swanson,* 560 F.2d 1, 2 (1st Cir. 1977)). The district court rejected the contention that the state action doctrine immunizes all state entities from antitrust scrutiny, noting that similar contentions had been "expressly rejected" by this Court. *Id.* at A22 (citing *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389, 408 (1978)).

On appeal, petitioners questioned only the district court's resolution of the state action issue. The court of appeals affirmed (Pet. App. A1-A17), observing that "the FTC has broad legal power to issue investigative subpoenas" (*id.* at A3) and that such subpoenas should be enforced unless it is established that the subpoenas are " 'plainly incompetent or irrelevant to any lawful purpose.' " *Id.* at A4 (quoting *Endicott Johnson Corp.* v. *Perkins,* 317 U.S. 501, 509 (1943)).

The court of appeals rejected petitioners' contention that the actions of the Board are legally equivalent to the sovereign actions of a state legislature or state supreme court. The court concluded, as had the district court, that this contention was contrary to relevant decisions of this Court interpreting the state action doctrine, and that the Board, as a subordinate state agency, could assert state action immunity only to the extent that its actions are authorized by a "clearly articulated and affirmatively expressed" state policy. Pet. App. A4-A5.

The court of appeals ruled that, at this stage, it could not and should not decide whether the Massachusetts legislative scheme constitutes the requisite clear and affirmative articulation of state policy (Pet. App. A5-A11). The court noted that the mere existence of a statutory

scheme authorizing regulation would not immunize any and all anticompetitive actions taken "under the guise of regulation" (*id.* at A5-A6). The court concluded that it was not possible to resolve the clear articulation issue "until we know more precisely what [the Board's] activities are" (*id.* at A7).

The court of appeals also pointed out that restrictions on competition imposed by a board subject to control by private pharmacists might possibly be treated as "essentially" private restraints rather than public actions, requiring a showing that the conduct was actively supervised by the state in order to establish a state action defense. Resolution of that issue would have to await more facts, bearing particularly on how the Board actually functioned and on the role played by those petitioners who compete in the sale of prescription drugs while serving on a Board whose activities in that market might be anticompetitive. Pet. App. A7-A8. Finally, the court explained that "[a]ll depends upon precisely what conduct turns out to be at issue, its harms, its justifications, and its relation to the [Board's] basic statutory mission" (*id.* at A10-A11).[2]

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[2] The court of appeals explicitly rejected petitioners' contention that it could resolve the state action issue without a factual record. In so doing, the court distinguished this case from its earlier decision in *Interface Group, Inc.* v. *Massachusetts Port Authority*, 816 F.2d 9, 10-14 (1987) (*Massport*). In *Massport*, the court had held, looking only at the allegations of the antitrust complaint, that policy decisions of a state airport authority were protected by the state action doctrine. Judge Breyer, who wrote the opinions of the court in both *Massport* and the present case, noted that *Massport* was a substantive antitrust action, not a subpoena enforcement proceeding. Therefore, it had been possible to compare the challenged activities with the authorizing legislation (Pet. App. A8-A10). Moreover, *Massport* involved the question whether the legislature had intended the airport authority to regulate particular airlines' use of terminals and access to taxiways. Thus, the court "could not conceive how the activities attacked could

Because of this "factual uncertainty," the court of appeals held that the state action defense asserted by petitioners afforded no reason to quash the subpoenas in this case (*id.* at A11).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Review by this Court is unwarranted.

1. The procedural posture in which this case arises is essentially dispositive, particularly in light of the First Circuit's determination (Pet. App. A6-A11) that further factual development is necessary to resolve petitioners' claim of state action immunity. The principal inquiry in a subpoena enforcement proceeding is whether the evidence sought is plainly irrelevant to any purpose within the statutory authority of the investigating agency and whether the demand is unduly burdensome. *E.g., Endicott Johnson Corp.* v. *Perkins,* 317 U.S. 501, 509 (1943); *United States* v. *Morton Salt Co.,* 338 U.S 632, 652 (1950); *United States* v. *Westinghouse Elec. Corp.,* 788 F.2d 164, 170 (3d Cir. 1986); *FTC* v. *Carter,* 636 F.2d 781, 787-789 (D.C. Cir. 1980); *FTC* v. *Texaco, Inc.,* 555 F.2d 862, 872-873 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977); *FMC* v. *Port of Seattle,* 521 F.2d 431, 433-436 (9th Cir. 1975).[3] "Thus, while the court's function is neither

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fall outside the area of immunity delineated by clear state policy" (*id.* at A9-A10). In this subpoena enforcement case, by contrast, it was not possible to determine what activities would be challenged or to decide whether such activities lay close to, or far from, the center of the "state statutes' basic purpose" (*id.* at A10 (citing 816 F.2d at 13-14)).

[3] Petitioners have raised no objections, either in the proceedings below or before this Court, based on relevance or burden.

'minor nor ministerial,' * * * the scope of issues which may be litigated in an enforcement proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity." *FTC* v. *Texaco, Inc.*, 555 F.2d at 872 (quoting *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 217 n.57 (1946)).

Consistent with this rule limiting the scope of inquiry in a subpoena enforcement proceeding, this Court has repeatedly refused to adjudicate objections to an agency's regulatory jurisdiction in such proceedings. Such "coverage" claims, although they may be raised as a defense against an administrative complaint, are premature when raised in opposition to a subpoena unless it is patently clear under existing law that the agency would lack regulatory jurisdiction. *E.g.*, *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. at 509; *Oklahoma Press Publishing Co.* v. *Walling, supra; FTC* v. *Crafts*, 355 U.S. 9 (1957) (per curiam).[4] Indeed, even a purely legal claim that an agency investigation is barred by the res judicata effect of a prior order cannot be raised in a subpoena enforcement proceeding. *EEOC* v. *Children's Hosp. Medical Center*, 719 F.2d 1426, 1430 (9th Cir. 1983) (en banc). This "coverage" rule is a specific application of the general ad-

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[4] Accord *EEOC* v. *Peat, Marwick, Mitchell & Co.*, 775 F.2d 928, 930 (8th Cir. 1985), cert. denied, 475 U.S. 1046 (1986); *FTC* v. *Ernstthal*, 607 F.2d 488 (D.C. Cir. 1979); *ICC* v. *Bay State Transp. Brokers*, 579 F.2d 113, 115 (1st Cir. 1978); *Casey* v. *FTC*, 578 F.2d 793, 798-799 (9th Cir. 1978); *FTC* v. *Swanson*, 560 F.2d 1, 2 (1st Cir. 1977); *FTC* v. *Texaco, Inc.*, 555 F.2d at 879; *SEC* v. *Howatt*, 525 F.2d 226, 229-230 (1st Cir. 1975); *FMC* v. *Port of Seattle*, 521 F.2d at 434; *SEC* v. *Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1053-1055 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974); see also *FTC* v. *Markin*, 532 F.2d 541, 543-544 (6th Cir. 1976); *FTC* v. *Feldman*, 532 F.2d 1092, 1095-1096 (7th Cir. 1976).

ministrative law principle that, even as to questions of law, an agency has primary jurisdiction to determine the scope of its own jurisdiction. *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972); *Casey* v. *FTC*, 578 F.2d 793, 798-799 (9th Cir. 1978); *American Gen. Ins. Co.* v. *FTC*, 496 F.2d 197, 200 (5th Cir. 1974).[5] As petitioners themselves informed the First Circuit: "[t]he need for courts to refrain from premature consideration of fact-based challenges to agency jurisdiction is well established" (C.A. Br. 33).

The opinion below is a routine application of this established body of controlling precedent to the two overlapping theories under which petitioners sought to invoke the state action defense. One theory was that this self-regulatory Board, although largely composed of and controlled by members of the regulated group, acted as the sovereign. This theory would have supported petitioners' claim of immunity under the state action doctrine because the sovereign itself—*e.g.*, the state legislature or the state supreme court when exercising legislative functions—enjoys automatic immunity. See *Hoover* v. *Ronwin*, 466 U.S. 558, 567-569 (1984). The court of appeals, however, declined to adopt this theory in the context of this subpoena enforcement case because it found that no such clear rule of law existed (Pet. App. A4-A5). That holding was correct. Far from being clearly "sovereign," state agencies and other subordinate governmental units are regularly assumed to be nonsovereign actors subject to the usual "clear articulation" requirement of the state action

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[5] This principle, which requires exhaustion of administrative remedies in the agency proceeding, is based both on recognition of the need for administrative autonomy and on considerations of judicial economy. *McKart* v. *United States*, 395 U.S. 185, 195 (1969); *FTC* v. *Swanson*, *supra*; *American Gen. Ins. Co.* v. *FTC*, *supra*.

doctrine.[6] See P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.3, at 114 (Supp. 1987) (collecting cases); *id.* ¶ 212.2c, at 111 (discussing *Southern Motor Carriers Rate Conference, Inc.* v. *United States,* 471 U.S. 48, 62-63 (1985)). This is particularly so when the state agency is—like the Board in this case—largely composed of members of the regulated industry. See *id.*¶ 212.9f; 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 217a3, at 107-108 (1978).

Petitioners' other theory before the court of appeals was that the "clear articulation" requirement, if applicable, was met merely because there was a statutory framework authorizing some form of regulation by the Board.[7] The court of appeals rejected this argument because it was premature unless and until the court had before it specific allegations of identified unlawful conduct, which could only be made after the FTC finished gathering facts and evidence (Pet. App. A7-A11). Since it was therefore not patently clear that there could be no legal basis for FTC enforcement activity as a result of the investigation, affirmance of the district court was required by this Court's cases defining and limiting the role of federal courts in administrative subpoena enforcement proceedings.

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[6] Ordinarily, a restraint does not constitute immune "state action" unless it is " 'one clearly articulated and affirmatively expressed as state policy' " and is " 'actively supervised' by the State itself." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.,* 445 U.S. 97, 105 (1980) (quoting *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389, 410 (1978) (plurality opinion)). This Court, however, has declared it "likely" that the second requirement—active supervision—is inapplicable when the actor is a state agency. *Town of Hallie* v. *City of Eau Claire,* 471 U.S. 34, 46 n.10 (1985).

[7] Petitioners do not press their "clear articulation" position before this Court. But cf. Pet. 50 n.21.

2. Petitioners err in their contention (Pet. 12-29, 34-50) that the First Circuit's state action analysis is inconsistent with this Court's precedents. To the contrary, this Court's precedents clearly preclude petitioner's theory that the Board is "*ipso facto* immune" under the state action doctrine (Pet. 34).

This Court has expressly regarded as sovereign acts of the state—"*ipso facto* immune" without any showing of clear articulation or active supervision—the legislative actions of state legislatures and the actions of state supreme courts acting in a legislative capacity; it seems appropriate that similar actions of a governor or other chief executive be so regarded as well, although this Court has reserved even that question. *Parker* v. *Brown,* 317 U.S. at 350-351 (legislature acts as the sovereign); *Bates* v. *State Bar,* 433 U.S. 350, 360-363 (1977) (same as to supreme court acting as the sovereign); *Hoover* v. *Ronwin,* 466 U.S. 558, 568 n.17 (1984) (resolution of question as to state governor not required). Since its earliest relevant decisions, however, this Court has squarely rejected the argument that *Parker* v. *Brown* stands for the proposition "that all governmental entities, whether state agencies or subdivisions of a State, are, simply by reason of their status as such, exempt from the antitrust laws." *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389, 408-409 (1978) (plurality opinion); see *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 791 (1975); *Bates* v. *State Bar, supra.*[8]

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[8] Petitioners dismiss the plurality's observations in *City of Lafayette* as ones "directed to *ultra vires* activities" (Pet. 43 n.17). Petitioners are mistaken. This Court's state action cases have never drawn a line between *ultra vires* and *intra vires* activities of state agencies (although *ultra vires* activities are unlikely to be immune). Rather, the Court has drawn a line between actions that are and actions that are not undertaken pursuant to clearly articulated state policy to

Moreover, in its opinion in *City of Lafayette*, this Court quoted with approval the Fifth Circuit's ruling that "[a] subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws." 435 U.S. at 393-394 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 532 F.2d 431, 434-435 (5th Cir. 1976)) (footnotes omitted by quoting Court). *City of Lafayette* followed the decision in *Goldfarb*, in which this Court unanimously ruled that the anticompetitive conduct of a state agency (the state bar) was not immunized unless the agency showed affirmative authorization or approval by the sovereign (*Goldfarb*, 421 U.S. at 791).[9] The *Goldfarb*

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displace competition with regulation. See generally P. Areeda & H. Hovenkamp, *supra*, ¶ 212.3a, at 116, 125. The Court has on several occasions allowed substantive antitrust scrutiny of actions that are within the powers of the state entity that directed or took them—*i.e.*, *intra vires* actions—precisely because no clearly articulated state policy supported them. *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb* v. *Virginia State Bar, supra;* cf. *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978). These decisions contradict petitioners' assertion that, for purposes of antitrust state action immunity, "a state agency acting *intra vires* is considered to be acting as the state" (Pet. 41; see Pet. 32-33).

[9] Although *Goldfarb* clearly holds that there is a fundamental distinction between the sovereign and subordinate agencies, petitioners seek to distinguish the case (Pet. 26, 28 n.13). They assert that the state bar association was really a private entity, not a state agency—an ironic argument in light of petitioners' apparent umbrage (see Pet. 14, 24-25, 33, 44 n.18) at any possible inquiry by a federal antitrust court into whether what is nominally a state agency is engaged in "activities [that] are 'essentially' those of private parties" (Pet. App. A8). Petitioners also suggest that the supervision of the bar association's actions by the state supreme court, rather than the state legislature, somehow makes *Goldfarb* irrelevant to a case involving a self-regulatory board. Both contentions are wrong. This Court in *Goldfarb* regarded the state bar association as a state administrative agency with regulatory and disciplinary powers (421 U.S. at 776-777 &

opinion also held that mere status as a state agency regulating professional conduct did not allow the state bar to engage in a conspiracy to advance the pecuniary interests of its professional members by fostering anticompetitive restrictions on competition. 421 U.S. at 791-792 (citing *Gibson* v. *Berryhill,* 411 U.S. 564, 578-579 (1973)). See generally 1 P. Areeda & D. Turner, *supra,* ¶ 217a3, at 107-108.

This Court's more recent state action decisions have consistently applied this distinction between acts of the sovereign itself and actions of subordinate state agencies and municipalities. These cases have repeatedly reaffirmed that restraints on trade imposed by subordinate agencies are immune from antitrust scrutiny only if imposed pursuant to a clearly articulated state policy—articulated by the sovereign, not simply by the subordinate agency or municipality—to displace competition with state regulation. *Community Communications Co.* v. *City of Boulder,* 455 U.S. 40, 53-54 (1982) (mere general delegation of power to municipality insufficient); *Southern Motor Carriers Rate Conference, Inc.* v. *United States,*

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n.2). In this Court's subsequent decision in *City of Lafayette*, the plurality rejected the argument that the state bar had been acting in a private capacity and emphasized that the holding of *Goldfarb* had involved "a state agency by law acting in its official capacity." *City of Lafayette*, 435 U.S. at 411 n.41. Likewise, in *Southern Motor Carriers Rate Conference, Inc.* v. *United States,* 471 U.S. at 63, the Court reiterated with approval its determination in *Goldfarb* that the state bar had been "a special type of 'state agency' " but had not been immune from antitrust scrutiny, and the Court concluded from *Goldfarb* that only such entities as a state legislature and state supreme court, not a state public utilities commission, were sovereign. Thus, nothing in this Court's state action case law supports petitioners' purported distinction between judicially authorized regulatory agencies and other regulatory bodies.

471 U.S. 48, 62-63 (1985) (only legislature, not subordinate agencies, could provide clear articulation needed to immunize private rate-setting); *Town of Hallie* v. *City of Eau Claire,* 471 U.S. 34, 46 n.10 (1985) (assuming that subordinate agencies, like municipalities, must show clear articulation).

Most significantly, in *Ronwin,* this Court was called on to determine whether challenged conduct was that of the state supreme court or of subordinate officials. This Court emphasized that the actions of subordinate agencies and municipalities are subject to "[c]loser analysis" because the "activity at issue is not *directly* that of the legislature or supreme court, but is carried out by others pursuant to state authorization" (466 U.S. at 568 (emphasis added; footnote omitted)). In such cases, it becomes important "to ensure that the anticompetitive conduct of the State's representative was contemplated by the State" (*ibid.*).[10] The opinion in *Ronwin* adverted repeatedly to the established distinction between action taken directly by the sovereign and action taken by the sovereign's subordinates.[11]

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[10] Petitioners contend (Pet. 27) that it was only in "dicta" that this Court in *Ronwin* referred to agencies other than the legislature or supreme court as "nonsovereign state representative[s]" (466 U.S. at 569). In fact, the entire issue in *Ronwin* was whether the conduct challenged was that of the state supreme court or that of a subordinate agency, which would have had to show clear articulation (*id.* at 568-569, 581). If the legal standards for establishing state action had been the same no matter how this question was answered (as petitioners seem to argue), then the Court in *Ronwin* would have had no state action issue to resolve.

[11] For example, the Court observed that its attention had not been drawn to any profession other than the legal profession in which licensing was "determined directly by the sovereign itself" (466 U.S. at 581 n.34). Yet, if the "*intra vires*" actions of self-regulatory boards

In short, it is petitioners' unsupported "*ipso facto*" theory, not the opinion below, that cannot be reconciled with this Court's state action decisions.

3. Petitioners contend that there is a conflict among the courts of appeals on the question presented by the petition (Pet. 34-50). But they do not and cannot in fact show that any court of appeals would have quashed the subpoenas in this case.

a. Petitioners contend that their "*ipso facto*" theory would have prevailed in the Fifth and Ninth Circuits (Pet. 29-31, 32-33). In fact, neither of those courts takes a view of the law that is inconsistent with the decision below.

The sole Fifth Circuit case on which petitioners rely (Pet. 30-31) is the one-page opinion in *Limeco, Inc.* v. *Division of Lime,* 778 F.2d 1086 (1985). In that case, the plaintiff competed with the Mississippi Lime Division, which had a statutory mandate to sell crushed limestone to Mississippi farmers at cost. The plaintiff apparently regarded compliance with that statutory mandate as monopolization or attempted monopolization forbidden by Section 2 of the Sherman Act, 15 U.S.C. 2. The court brushed aside that argument in a single paragraph that cited only *Parker* v. *Brown, supra. Limeco* was a classic case for immunity in light of the clearly articulated state

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were necessarily regarded as the action of the sovereign itself (see Pet. 32-33, 41), it would be quite typical for professional licensing to be determined directly by the sovereign itself. The Court also drew a distinction between the sovereign and "the committees, commissions, or others who necessarily must advise the sovereign" (466 U.S. at 580). Yet, if petitioners' theory is correct, sovereignty is an attribute shared by supreme and subordinate state officials alike, and there would be little need or room anywhere in state government for nonsovereign actors.

policy to sell crushed limestone to farmers at cost, in light of the nature of the agency whose activities were challenged, and in light of the truly ministerial nature of the acitivities of that agency. See P. Areeda & H. Hovenkamp, *supra,* ¶ 212.2d. at 114 n.43. The court had no occasion to—and did not remotely—suggest that the activities of self-regulatory boards enjoy any kind of per se immunity from the federal antitrust laws. In particular, the court said nothing that could be taken to overrule *United States* v. *Texas State Bd. of Public Accountancy,* 592 F.2d 919 (5th Cir. 1979), aff'g on the basis of opinions below 464 F. Supp. 400 (W.D. Tex. 1978), cert. denied, 444 U.S. 925 (1979), in which the court had found that a state regulatory board was not immune—automatically or otherwise—from the federal antitrust laws. See also *City of Lafayette* v. *Louisiana Power & Light Co.,* 532 F.2d 431, 434-435 (5th Cir. 1976), aff'd, 435 U.S. 389 (1978).

The Ninth Circuit's case law may fairly be described as more diffuse, but it does not support petitioners' position. First, in only one relevant Ninth Circuit case has a state agency sought to stop an FTC proceeding in its tracks, rather than asserted the state action defense in response to specific accusations of illegal conduct. *California ex rel. Chistensen* v. *FTC,* 549 F.2d 1321, cert. denied, 434 U.S. 876 (1977). That decision, written by Judge Goodwin, reaches the same conclusion as the decision below: *i.e.,* that that doctrine was prematurely invoked because "a full factual development is an essential prerequisite for determining the *Parker v. Brown* question" (549 F.2d at 1325).

Second, even in the context of a state action defense in response to specific charges, the Ninth Circuit's most recent decision on point squarely rejects petitioners' "*ipso*

facto" theory. In *Washington State Elec. Contractors Ass'n* v. *Forrest,* No. 85-4232 (Feb. 8, 1988), the plaintiff challenged regulations of the Washington State Apprenticeship and Training Council, established by a state statute to consist of six members appointed by the state Director of Labor and Industries, one member appointed by the Governor, and two state officials as ex officio members (slip op. 1420). The regulations under challenge had been validly promulgated by the Council under general statutory grants of authority (*id.* at 1420-1421). Judge Goodwin wrote for the court (*id.* at 1424-1425):

> At the outset, we reject defendant's contention that the Council's actions are in effect actions of the state legislature as sovereign and therefore "absolutely immune" from antitrust scrutiny. A clear distinction exists between acts undertaken by the legislature or state supreme court and acts delegated to and carried out by others "pursuant to state authorization." *Hoover* [v. *Ronwin*], 466 U.S. at 568. Only the former are absolutely immune. *Id.* at 567-68, *citing Parker,* 317 U.S. at 350-51. * * * [S]crutiny * * * is required when agents of the state rather than the state itself conduct anticompetitive activities.

Thus, the Ninth Circuit has rejected petitioners' position in clear terms.[12]

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[12] Indeed, as petitioners admit (Pet. 32), the Ninth Circuit recently held that a subordinate state agency (actually a member of a self-regulatory board) must establish that challenged conduct was supported by a clearly articulated policy of the state legislature, the standard correctly applied below. *Patrick* v. *Burget,* 800 F.2d 1498, 1506-1507 (9th Cir. 1986), cert. granted, No. 86-1145 (argued Feb. 22, 1988).

To be sure, Judge Goodwin's opinion for the court in *Deak-Perera Hawaii, Inc.* v. *Department of Transp.*, 745 F.2d 1281 (9th Cir. 1984), cert. denied, 470 U.S. 1053 (1985), contains language that could be read to support the proposition that all state executive branch agencies are sovereign for purposes of state action immunity, and another Ninth Circuit panel recently treated *Deak-Perera* as controlling in *Charley's Taxi Radio Dispatch Corp.* v. *SIDA of Hawaii, Inc.*, 810 F.2d 869, 875-876 (1987). But both cases involved the same cabinet agency of the Hawaii state government, not a self-regulatory agency consisting principally of members of the regulated industry—a kind of agency as to which the *Deak-Perera* court said "the inquiry would be different" (745 F.2d at 1283 (citing *Benson* v. *Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 274-276 (9th Cir. 1982)); see also 745 F.2d at 1283 n.1). Thus, even leaving aside the Ninth Circuit cases that squarely repudiate petitioners' position, neither *Deak-Perera* nor *Charley's Taxi* conflicts with the decision below. See P. Areeda & H. Hovenkamp, *supra*, ¶ 212.2c, at 111-112 & n.32. There is no conflict warranting resolution by this Court in the context of this case.

b. Petitioners also claim a conflict in the circuits based on a perceived holding by the court of appeals "that, to demonstrate clear and affirmative legislative support for its policies, a regulatory agency must demonstrate (here, to the satisfaction of a specialized federal agency) that its policies serve a legitimate regulatory purpose, are reasonable, and do not represent essentially private activities" (Pet. 33). This "holding" is also said to be inconsistent with decisions of this Court (Pet. 45-50).

Petitioners have misunderstood the decision below, and in any event this case hardly presents an appropriate vehicle for elaboration of the criteria to be applied as part of the

"clear articulation" inquiry. The passage that petitioners find troubling is merely an explanation by the court of appeals of why the clear articulation issue could not be resolved because of "factual uncertainty." The court listed a variety of issues that might be relevant to resolution of that issue, including whether any restrictions ultimately challenged had a legitimate regulatory purpose. Pet. App. A5-A11. Far from holding that such proof would be required, the court went on to state that, even if no legitimate regulatory purpose emerged, the activities might still be supported by clearly articulated state policy, if closely related to the basic purpose of the legislature in creating the regulatory scheme (*id.* at A7, A9-A10).

Furthermore, the issue of when activity by state actors is (and when it is not) supported by clearly articulated state policy is a difficult question that is particularly ill suited to abstract discussion unilluminated by a detailed factual and legal context. See generally 1 P. Areeda & D. Turner, *supra*, ¶ 214; P. Areeda & H. Hovenkamp, *supra*, ¶ 212.3. We do not doubt that this Court will and should have more to say on that subject, but this case presents a singularly inappropriate vehicle for further pronouncements by the Court. There is no factual record in this case, nor does the FTC know at this point which Board activities—if any—it will view as objectionable under the antitrust laws. Thus, any opinion by this Court elaborating on "clear articulation" criteria would provide nothing more than advice to the courts below and the FTC on how to go about making future determinations. This Court's certiorari jurisdiction does not exist for the purpose of providing such hypothetical advice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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